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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-907

LAWRENCE INGRAM, Secretary,
Department of Human Services
of New Mexico,

Petitioner,

vs.

JACQUELINE NOLAN, on Behalf of
Herself and on Behalf of Her
Minor Children, Daniel Schmitz,
Deborah Schmitz and Dwayne
Schmitz,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

RESPONDENT JACQUELINE NOLAN'S BRIEF IN OPPOSITION

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OPINIONS BELOW

The Opinion and Judgment of the United States District Court for the District of New Mexico are unreported but may be found at pages 1a-6a of the Appendix to the Petition for a Writ of Certiorari.[1] The Opinion of the United States Court of Appeals for the Tenth Circuit is reported at 603 F.2d 810 (1979) and is found at pages 7a-11a of the Appendix to the Petition for a Writ of Certiorari.

[1]The Petition for Writ of Certiorari is cited as "Pet." The Appendix to the Petition is cited as "Pet. App."

JURISDICTION

The Judgment, Pet. App. D at 12a, of the United States Court of Appeals for the Tenth Circuit was filed on August 13, 1979. By order of Mr. Justice White, the time for filing the Petition for a Writ of Certiorari was extended to December 11, 1979. Pet. App. E at 13a. The Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit was filed in this Court on December 11, 1979. The Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the district court and court of appeals below correctly decided that New Mexico Department of Human Services' regulation, HSSD Man. § 221.832, by conclusively assuming that approximately one-half of a nonadoptive stepfather's income is available to meet the needs of his stepchildren receiving Aid to Families with Dependent Children (AFDC) assistance, is invalid as contrary to controlling federal regulations.

STATEMENT

The Petitioner seeks review of a unanimous opinion of the United States Court of Appeals for the Tenth Circuit holding per curiam that certain practices of the New Mexico Department of Human Services ("Department")[2] in administering the AFDC program were contrary to the controlling federal statute and

[2]Due to the State reorganization referred to by Petitioner, Pet. at 1 n. 1, the name of the State agency administering the AFDC program was changed from Health and Social Services Department (HSSD) to Department of Human Services. For convenience, the agency will be referred to by its current name, and reference to the State regulation will be to the HSSD Manual in force at the time the case was decided in the courts below.

regulations and hence were invalid. Specifically, the court of appeals below ruled invalid the practice of the Department in conclusively assuming that approximately one-half of the income of a nonadoptive stepfather is available to meet the needs of his stepchildren receiving AFDC assistance. This income presumption is embodied in the Department's AFDC regulation found in HSSD Man. § 221.832, commonly referred to as the "community property" regulation.

This lawsuit was instituted by Jacqueline Nolan, on behalf of herself and her three minor children, Deborah, Daniel, and Dwayne Schmitz. The three Schmitz children are the natural children of Mrs. Nolan by her first marriage (R. 103). The Schmitz children reside with Mrs. Nolan and her present husband, Michael Nolan, in Belen, New Mexico (R. 103, 159). Mr. Nolan is neither the natural nor the adoptive father of the Schmitz children; as such, under New Mexico law, Mr. Nolan is not obligated to support the children (R. 103, 107, 159). In fact, Mr. Nolan cannot and does not voluntarily or regularly make his income available to meet the financial needs of the Schmitz children (R. 79-80, 107).

Since 1971, the Schmitz children have been receiving assistance pursuant to the AFDC program administered by the Department (R. 103-04, 160). Neither Michael Nolan nor Jacqueline Nolan are applicants for or recipients of AFDC, and the AFDC grant to the Schmitz children is computed to meet the needs only of the three children (R. 104). In October 1976, Mrs. Nolan was notified by the Department that the AFDC assistance to her three children would be reduced from One Hundred Sixty-three Dollars ($163) a month to Two Dollars ($2) a month (R. 105, 160). The sole basis for this proposed reduction in AFDC assistance was the operation of the Department's community property regulation (R. 105, 160). There was no change

in the financial circumstances of the Nolan-Schmitz household during this period which invoked the proposed reduction in AFDC assistance. Rather, pursuant to the Department's regulation, one hundred eighty-six dollars of Mr. Nolan's income was considered available to meet the needs of the Schmitz children (R. 105-06, 160-61). This conclusive attribution of income was made solely by legal operation of the community property regulation; no inquiry was made by the Department into whether Mr. Nolan in fact made any of his income available to meet the needs of the Schmitz children (R. 106, 161).

It was this proposed reduction in AFDC assistance to her three children of which Mrs. Nolan complained in this suit. In a three-count complaint, Mrs. Nolan challenged the Department's community property regulation as contrary to the due process and equal protection clauses of the fourteenth amendment; section 402(a) of the Social Security Act, 42 U.S.C. § 602(a); and implementing regulations of the United States Department of Health, Education and Welfare (HEW), 45 C.F.R. §§ 233.90(a), 233.20(a)(3)(ii)(D). On November 28, 1977, the district court entered summary judgment on count one of Mrs. Nolan's complaint, holding that "the State's regulation contravenes its [45 C.F.R. § 233.90(a)] provisions and those of the Social Security Act." Pet. App. at 5a. On appeal to the United States Court of Appeals for the Tenth Circuit, the judgment of the district court was affirmed, the court of appeals holding that the "operation of appellant's community property regulation obviously contravenes the federal [Social Security] act and HEW's regulation." Pet. App. at 11a.

REASONS FOR DENYING THE WRIT

In his Petition for a Writ of Certiorari, Secretary Ingram raises three questions for review. The first question Petitioner seeks to present is whether certain income of Mr.

Nolan, "as a matter of New Mexico community property law, is community income." Pet. at 2. The second question asks whether the Department's community property regulation "conform[s] to the principles of the State's community property law." Pet. at 2. The third question poses the issue of whether the assumption of income embodied in the Department's community property regulation conflicts with applicable federal statutes or regulations. The first two questions presented by Petitioner are inappropriate for review as they raise narrow and local questions of New Mexico state law and were not decided by either of the courts below. Moreover, Petitioner fails to establish that the decision by the court of appeals below is in conflict with any decisions of this Court, any other circuit court of appeals, or any appellate court of any state.

I.

By his first question presented, Petitioner seeks review of an issue which was not decided by either of the courts below and for which the record provides no factual predicate for resolution. In her complaint, Mrs. Nolan never raised any factual or legal issue over whether any or all of Michael Nolan's income was community property under New Mexico law. The case was submitted to the district court on an extensive stipulation of facts, not one of which addresses the circumstances of Mr. Nolan's earned income or "G.I. Bill" educational benefits. The record in this case is wholly silent on any of the facts which may be determinative[3] of whether the

[3]Exemplary of the kind of factual information which might inform the decision but which is not reflected in the record are such matters as (1) whether Mr. Nolan's service in the armed forces, from which his G.I. Bill benefits derive, was performed prior to his marriage to Mrs. Nolan or during his marriage to Mrs. Nolan; (2) how much Mr. Nolan's G.I. Bill benefits are and how they were calculated; (3) whether the amount of Mr. Nolan's G.I. Bill benefits were based, in part, on the presence in the home of Mrs. Nolan's children.

income should be considered community property under New Mexico law. It is clear that the record established in the courts below will not support a resolution of the question whether Mr. Nolan's earned income and G.I. Bill benefits are community property under New Mexico law. As such the first question presented in the Petition for a Writ of Certiorari takes on a hypothetical cast and is inappropriate for review by this Court.

The second question raised in the Petition for a Writ of Certiorari asks whether the challenged AFDC regulation conforms to New Mexico's community property law. This issue was never squarely presented to or decided by either the district court or the court of appeals. In both courts below, the Department sought to justify its regulation on the basis of New Mexico's community property law. Both courts rejected the proffered justification. The district court stated: "The assumption that New Mexico's community property laws may give plaintiff an interest of some kind in his [Mr. Nolan's] income is not sufficient to bring the regulation into compliance with federal requirements." Pet. App. at 6a. Similarly, the court of appeals stated: "Arguing that Mrs. Nolan has income under community property does not change the impact of the community property regulation." Pet. App. at 11a. In characterizing the rejected justification as an "assertion" or an "argument," both courts carefully avoided deciding whether the regulation was consonant with New Mexico's community property law.

This Court has declined repeatedly to consider questions not clearly decided by the courts below. *See, e.g., Mabee v. White Plains Publishing Co.*, 327 U.S. 178, 184-85 (1946); *Zellenbach Paper Co. v. Helvering*, 293 U.S. 172, 182 (1934);

Duingan v. United States, 274 U.S. 196, 200 (1927). Petitioner offers no exceptional circumstances warranting departure from this general rule, as indeed he could not. On this basis alone, review is inappropriate.

Finally, as Petitioner has couched his first two questions presented, they raise only state law issues. Certainly, the question of the characterization of Michael Nolan's income as community property or the question whether the New Mexico AFDC regulation is consistent with New Mexico state law are hardly of such national importance as to warrant this Court's review. Resolution of the first question presented will have impact only in this one case. Resolution of the second issue presented by Petitioner will have impact only in New Mexico. By his first two questions presented, therefore, Petitioner would have this Court reach out to decide issues wholly parochial to New Mexico, not decided by the courts below, and upon a record which will not form a factual predicate for the resolution of at least one of the issues. Under the well-established policies of this Court, review of these issues is inappropriate.

II.

Petitioner points to no decision of other federal circuit courts which conflict with the decision below. Nor does Petitioner appear to argue that the decision below conflicts with decisions of appellate courts of any state. Indeed, in *Barela v. New Mexico Department of Human Services*, 18 N.M. Adv. Sh. 51 (Ct. App. Oct. 30, 1979) (No. 4059), the New Mexico intermediate appellate court clearly held invalid the community property regulation, as inconsistent with the controlling federal statute and regulations. In reaching this result, the New Mexico Court of Appeals expressly relied on the Tenth Circuit's decision in the instant case. Since the

filing of the Petition for a Writ of Certiorari in this case, the New Mexico Supreme Court has declined to review the *Barela* decision.

The only other state court decision which addresses a regulation similar to the one struck down in this case also is consistent with the opinion of the court of appeals below. In *Camp v. Swoap*, 94 Cal. App. 3d 733, 156 Cal. Rptr. 600 (1979), the California intermediate appellate court held invalid a California AFDC regulation which sought to presume one-half the income of a nonadoptive stepfather as available to meet the needs of the stepchildren. Like New Mexico in the instant case, the California welfare agency sought to justify its regulation on the basis of California's community property law. The court, in reasoning substantially identical to that of the courts below, held that the "challenged regulations are incompatible with this federal provision [45 C.F.R. § 233.90(a)] barring states from assuming that nonlegally responsible persons will apply their resources to aid dependent children." 94 Cal. App. 3d at ___, 156 Cal. Rptr. at 607. Clearly, the decision of the court of appeals below is consistent with the holdings and reasonings of the only state court cases confronting this issue.

Finally, Petitioner appears to argue that the decision of the court of appeals below conflicts with applicable decisions of this Court. Such a contention, however, is without merit. Petitioner points to no conflict between the decision below and any holding of this Court. Rather, he seeks to create a conflict between the decision below and language in several decisions of this Court.

Petitioner has cited *Poe v. Seaborn*, 282 U.S. 101 (1930), and its companion cases, *Bender v. Pfaff*, 282 U.S. 127 (1930), and *Hopkins v. Bacon*, 282 U.S. 122 (1930), for the principle

that this Court has recognized that community property states have a concept of marital property different from that of other states. Pet. at 10. Respondent does not quarrel with this. Any claimed conflict between these cases and the decision below, however, is mistaken. These cases stand only for the narrow proposition that the definition of "income" for the limited purposes of the Internal Revenue Code may be governed by state law. It is clear that in the administration of the AFDC program under the Social Security Act, the definition of "income" is governed by federal law. 45 C.F.R. §§ 233.20(a)(3)(ii), 233.90(a); *Van Lare v. Hurley*, 421 U.S. 338 (1975); *Lewis v. Martin*, 397 U.S. 552 (1970).

Petitioner's reliance on *United States v. Yazell*, 382 U.S. 341 (1966), as being in conflict with the decision below, is equally misplaced. *Yazell* involved the enforcement of a contract, an area of law commonly reserved to the states. The Court framed the issue in *Yazell* as follows:

> [W]hether in connection with an individualized, negotiated contract, the Federal Government may obtain a preferred right which is not provided by statute or specific agency regulation, which was not a part of its bargain, and which requires overriding a state law dealing with the intensely local interests of family property and the protection ... of married women.

382 U.S. at 349. In contrast to *Yazell*, this case involves the administration of a federal-state program, in which there are federal statutes and specific agency regulations which would be contravened if Petitioner is permitted to misuse New Mexico's community property law. *See* 45 C.F.R. § 233.90(a).

Contrary to Petitioner's claim, the decision of the court of appeals is in harmony with a well-established line of decisions of this Court, prohibiting states, in the administration of the AFDC program, from presuming that income of nonlegally responsible relatives is available to meet the needs of needy

dependent children receiving AFDC assistance. *See Van Lare v. Hurley*, 421 U.S. 338 (1975); *Lewis v. Martin*, 397 U.S. 552 (1970); *King v. Smith*, 392 U.S. 309 (1968). Petitioner's narrow reading of *King v. Smith* and *Lewis v. Martin* as "man-in-the-home" and "stepparent" cases, Pet. at 11, is similar to arguments clearly rejected by this Court in *Van Lare*[4] and by HEW in its revision of 45 C.F.R. § 233.90(a) to conform to the *Van Lare* decision. *See* 42 Fed. Reg. 6583 (Feb. 3, 1977). As this Court made abundantly clear in *Van Lare*, the definition of income for purposes of administration of the AFDC program is a matter of federal law, and variant state definitions which seek to assume the availability of income from non-legally responsible relatives are invalid. After this Court's decision in *Van Lare*, there can be no doubt that the provisions of 45 C.F.R. § 233.90(a) control the definition of "income" for AFDC purposes. Petitioner's argument that "*King* and *Lewis* should not be extended to this case," Pet. at 11, comes five years too late. If there were any doubt[5] of the application of *King* and *Lewis* to "income" cases, as Petitioner so labels this case, Pet. at 11, that doubt was resolved explicitly in *Van Lare*.

III.

Finally, Petitioner argues that the decision of the court of appeals below constitutes "a serious breach of State

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[4]The decision of the United States Court of Appeals for the Second Circuit, reversed in *Van Lare*, read *King v. Smith* narrowly as only defining the term "parent." *See Taylor v. Lavine*, 497 F.2d 1208, 1214-15 (2d Cir. 1974).

[5]There really was little or no doubt over the reach of this Court's decisions in *King* and *Lewis* and their application to state presumptions of income in the AFDC program. Even prior to the *Lewis* decision, this Court's summary affirmance of a three-judge district court decision applying *King* to invalidate a Connecticut income-presumption regulation clearly indicated the reach of the *King* decision. *Solman v. Shapiro*, 300 F. Supp. 409 (D. Conn.), *aff'd*, 391 U.S. 5 (1969).

vereignty." Pet. at 13. Apparently, Petitioner sees the decision of the court of appeals as a threat to the New Mexico community property regime. Pet. at 14-15. The perceived threat is far-fetched. The decision of the court below did not override nor invalidate nor preempt any portion of New Mexico's community property laws. Each sentence of those laws remains in full force and effect just as California's community property laws were not disturbed by the decision in *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979).

Petitioner misapprehends the nature of the court of appeals' decision in this case. The decision below leaves New Mexico free "to govern its marital and property relationships." Pet. at 14-15. The only impact of the decision of the court of appeals is on New Mexico's administration of the AFDC program, in an area where this Court has repeatedly held that state administration must conform to federal requirements. Viewed in this light, Respondent submits that "[d]espite the extravagent claims made on this score by [Petitioner] ... [the decision below] constituted no such drastic invasion of state sovereignty." *Fry v. United States*, 421 U.S. 542, 547 n. 7 (1975).

CONCLUSION

For the reasons stated above, the Writ of Certiorari sought by Petitioner should be denied.

Respectfully submitted,

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CERTIFICATION

I hereby certify that on this ninth day of January, 1980, three copies of a Motion to Proceed in Forma Pauperis, Affidavit in support of such motion, and Respondent's Brief in Opposition to Petition for a Writ of Certiorari were mailed, postage prepaid, to counsel for Petitioner:

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